



# ***COMPLIANCE: The HQDA Perspective***

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# Agenda

- Perchlorate
- Pesticides and the Clean Water Act
- Penalty Issues
  - Penalty Authority
  - State-Imposed CAA Penalties
  - “Business Penalties” and Fort Wainwright Litigation



# **Perchlorate**

## ***Background***

- **Perchlorate is an anion that originates as a contaminant in ground water and surface waters when the salts of ammonium perchlorate, potassium perchlorate, magnesium perchlorate, or sodium perchlorate dissolve in water**
- **Ammonium perchlorate is the primary component in solid propellant for rockets, missiles, and fireworks**
- **Manufacture and disposal of such items is one major source of contamination**
- **Perchlorate is still in its infancy in terms of the regulatory process**
- **Nevertheless, Army installations are facing public and regulatory pressure to take steps now to investigate for and remediate perchlorate contamination**



# **Applicability of Selected Statutes to Perchlorate**

- **RCRA**

- **Corrective Action - could be SW and HW under broad statutory definitions. Under narrower regulatory definitions, not a listed HC or HW. Would only qualify as regulatory HW if it exhibits hazardous characteristic.**
- **Imminent and Substantial Endangerment - broader statutory definition of SW applies. Courts give EPA broad discretion in determining what poses a risk to human health and the environment.**
- **Omnibus Authority - usually used to obtain technological improvements and operational changes at TSD facilities that otherwise aren't required by regulation.**



# **Applicability of Selected Statutes to Perchlorate (*cont.*)**

- **CERCLA**
  - **Not a listed CERCLA “hazardous substance”**
  - **Could be an unlisted “hazardous substance” if it is a RCRA hazardous waste**
  - **Most likely a “pollutant” or “contaminant”**
  - **Response action not required, however, unless release presents an “imminent and substantial danger” to the public health or welfare**



# **Applicability of Selected Statutes to Perchlorate (*cont.*)**

- **CWA**

- **Not a listed “hazardous substance” or “toxic/priority pollutant”**
- **Most likely an unconventional pollutant**
  - ✓ CWA defines “pollutant” to include solid waste, munitions, and chemical waste
  - ✓ CWA does not define the terms “solid waste”, “munitions”, or “chemical waste”
- **If perchlorate is a CWA pollutant, standard analysis would apply to determine if discharge permit required**
  - ✓ Effluent Guidelines (Stormwater & Non-stormwater discharges)
  - ✓ Water Quality Standards
- **Nonpoint Source Requirements**





# **Applicability of Selected Statutes to Perchlorate (*cont.*)**

- **SDWA**
  - **Currently, no MCL; listed on the CCL**
  - **Since 2001, all large public water systems and a representative sample of small public water systems must monitor for perchlorate under the UCMR**
  - **Wellhead Protection Program could be used to regulate perchlorate in the absence of an MCL**
    - ✓ **Restrict/control installation activities**
    - ✓ **Protective requirements (e.g., monitoring)**
    - ✓ **Treatment**
  - **Sole Source Aquifer Designation**
  - **Emergency Powers**



# **EPA Risk Toxicity Assessment and Interim Assessment Guidance**

- EPA draft toxicity assessment for perchlorate (revised in Jan 02) proposes an oral reference dose (RfD) of .00003 mg/kg/day and provides a hypothetical conversion of the draft RfD to a DWEL of 1 ug/L, or 1ppb**
- On 22 Jan 03, EPA reaffirmed its 1999 interim assessment guidance establishing a provisional clean-up/action level for perchlorate of between 4 and 18 ppb pending finalization of an oral health risk benchmark**
- 22 Jan 03 guidance also “suggests” Regions “carefully consider” the low end of the 4-18 ppb range**
- EPA has suspended further comment until completion of National Academy of Sciences assessment of studies underlying EPA’s 2002 draft toxicity assessment**





# **DoD Guidance and Activities**

- **DoD Perchlorate Assessment Policy - 13 Nov 02**
  - **Permits sampling if suspect BOTH potential presence and pathway**
  - **Silent on actions beyond sampling**
  - **Under revision**
    - ➔ **Interim Policy on Perchlorate “Activities”**
    - **Consolidation of existing data/maintenance of databases**
    - **Sampling where release suspected and complete human exposure pathway exists**
    - **Funding; ERA if DERP eligible; Class I compliance**
- **California and Inland Empire**



# **Army Guidance and Activities**

- **Army Guidance for Addressing Potential Perchlorate Contamination - 27 Jun 03**
  - **Sample, assess, respond if required by federal/state law**
  - **In absence of legal driver, may “respond” if**
    - ✓ **Suspect potential release associated with DoD activities;**
    - ✓ **Pathway with potential to threaten public health; AND**
    - ✓ **HQDA authorization**
  - **Written sampling plans coordinated with ELD**
  - **Sampling results reported to AEC**
- **Massachusetts Military Reservation and Aberdeen Proving Ground**



# **Pesticides and the Clean Water**

## **Act**

- **Issue - whether and under what circumstances is it necessary to obtain a NPDES/SPDES permit to apply pesticides in, on over or near navigable waters?**
- **Multiple lawsuits have challenged the use of pesticides without a CWA permit**
  - **No Spray I (S.D.N.Y. 2000) - CWA not required if use within category of uses for which EPA has approved pesticide**
  - **Headwaters v. Talent Irrigation (9<sup>th</sup> Cir. 2001) - CWA permit required if permitting criteria (discharge, pollutant, point source, waters of US) triggered**
  - **Altman v. Town of Amherst (W.D.N.Y. 2001) - no CWA permit required; pesticides used for their intended purpose are not “pollutants” under the CWA (vacated by 2<sup>nd</sup> Cir. In 2002 on procedural grounds)**
  - **League of Wilderness Defenders v. US Forest Service (9<sup>th</sup> Cir. 2002) - CWA permit required**
  - **No Spray II (S.D.N.Y. 2002) - CWA permit not required per legal framework developed in No Spray I**



# **Pesticides and the Clean Water Act (*cont.*)**

- **EPA Interim Guidance - 11 Jul 03**
  - **Identifies two circumstance when CWA permit is not required**
    - ✓ **Application of pesticides directly to waters of US to control pests**
    - ✓ **Application of pesticides to control pests that are present over waters of the US that results in a portion of the pesticides being deposited to waters of the US**
  - **Both require FIFRA compliance**
- **On 13 Aug 03, EPA solicited comments on the 11 Jul 03 interim guidance (68 Federal Register 48385)**



# **Penalty Authority**

*See Handout for Additional Details*

<b>Statute</b>	<b>Imposed by State</b>	<b>Imposed by EPA</b>
<b>RCRA Subtitles C and D (HW/SW)</b>	<b>YES 1992</b>	<b>YES 1992</b>
<b>RCRA Subtitle I (USTs)</b>	<b>NO</b>	<b>YES 2000</b>
<b>SDWA</b>	<b>YES 1996</b>	<b>YES 1996</b>
<b>CAA</b>	<b>YES/NO</b>	<b>YES 1997</b>
<b>CWA</b>	<b>NO</b>	<b>NO</b>



# **State-Imposed CAA Penalties**

## ***Litigation and DOJ Position***

- **Case law unsettled as to whether CAA waives sovereign immunity for state-imposed punitive fines; most recent cases favor waiver**
- **DOJ Position**
  - **Previous guidance: assert immunity as a defense to state-imposed fines, except in California, Kentucky, Michigan, Ohio, and Tennessee**
  - **New guidance effective 15 May 02**
    - ✓ **Installations may pay state fines in all states except Florida, Alabama, and Georgia**
    - ✓ **Settlement agreement must expressly state that the federal government does not admit liability and does not waive sovereign immunity under the CAA**
    - ✓ **All settlements must be coordinated with DoJ through the Army Environmental Law Division**





# **State-Imposed CAA Penalties**

## ***DOJ-Approved Model Language***

**“The Parties have reached this agreement in full recognition of their respective positions on waiver of sovereign immunity under the Clean Air Act (“CAA”). Fort Carson asserts that the CAA has not waived sovereign immunity for the Division’s assessment of punitive fines or penalties. The Division and the State of Colorado do not concur in this position and believe they do, in fact, have the authority to assess such fines or penalties. The Parties agree that nothing in this Consent Order may be construed in any way as a waiver of either Party’s position on sovereign immunity. This Consent Order shall not constitute a waiver of federal sovereign immunity for state-imposed civil penalties, nor shall this Consent Order constitute an admission by Fort Carson that such a waiver of federal sovereign immunity exists. Further, the Parties agree that this Consent Order is *sui generis* and, therefore, shall not be cited by either party as binding precedent for resolution of future situations of this or any other type.”**



# **State-Imposed CAA Penalties**

## ***Administrative Fee Option***

CAA Section 118(a): Federal facilities “shall be subject to” --

*“any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program.”*



# **“Business Penalties”**

- ***Issue:* Do business-based penalty criteria (i.e., economic benefit (EB) and size of business (SOB) apply when calculating civil fines against federal facility violators?**
- **Spotlighted in EPA Region 10’s Clean Air Act enforcement action against Ft. Wainwright, Alaska**
- **Ft. Wainwright Penalty Calculation - \$27 mil (\$680K gravity; \$12.1 mil EB; \$12.8 mil SOB)**
- **EPA reduced penalty to \$16 mil “because this is the first case of this magnitude against a federal facility”**



# **“Business Penalties”**

## ***EPA Administrative Law Judge Decision***

- **Business penalty issue argued before EPA’s Chief Administrative Law Judge (ALJ) on 4 Oct 01**
- **Decision issued 30 Apr 02**
  - **EB and SOB apply as a matter of law and may be taken into account in adjusting civil penalties in federal facility enforcement cases**
  - **Redefines and broadens EB to include “non-monetary benefits and benefits which cannot be invested in any profit-making activities” - e.g., “budgetary flexibility”**
  - **Fiscal law prevents USARAK from borrowing funds and earning income on investments, but BEN Model is not the only mechanism for calculating EB**
  - **USARAK should have begun baghouse construction in the earliest year in which it had a MILCON appropriation large enough to fund the expenditure**
  - **Appears to disfavor use of entire Army budget to calculate SOB surcharge**
- **Fact specific; could result in no adjustment or an adjustment less than that proposed by the regulator**



# **“Business Penalties”**

## ***EAB Decision***

- **ALJ’s decision appealed May 02; argued before EPA’s Environmental Appeals Board (EAB) Nov 02**
- **Decision issued 5 Jun 03**
  - **Upheld ALJ’s conclusion that EB and SOB apply as a matter of law and are “appropriately considered” when calculating civil penalties against a federal agency violator**
  - **Upheld ALJ’s ruling that USARAK cannot borrow and invest funds and, as such, BEN Model is an improper mechanism for calculating economic benefit**
  - **Reversed ALJ ruling that MILCON is interchangeable**
  - **EAB noted that decision should not be interpreted to suggest that issues Army raised are unimportant and that EPA should not underestimate the difficulties associate with proving EB when a federal agency subject to appropriations laws and the federal budgetary process is the violator**





## **“Business Penalties” “Compromise” on Wainwright**

- **FY 01 Defense Authorization Act, Section 314**  
*“The Secretary of Defense, or the Secretary of the Army, may pay, as part of a settlement of liability, a fine or penalty of not more than \$2,000,000 for matters addressed in the Notice of Violation issued on March 5, 1999, by the Administrator of the Environmental Protection Agency to Fort Wainwright, Alaska.”*
- **Settled for \$2 million on 28 Aug 03; settlement includes some amount for EB/SOB**





# **“Business Penalties”**

## ***Impact of EAB Decision & Way Ahead***

- **Pending EPA CAA enforcement action at Ft. Jackson where SOB penalties are also an issue**
- **Expect EPA to propose penalties based on EB and/or SOB in all future cases**
- **Impact in state cases unclear; to date, most states have not included EB and SOB in their penalty assessments**
- **DoD will pursue politically by developing proposal for EPA designed to result in a sensible “federal facilities business penalties” policy**



***Questions?***